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May 27, 2004

BY HAND DELIVERY

Mr. Walter Thomas
Secretary
Alabama Public Service Commission
RSA Union Building
8th Floor
100 N. Union Street
Montgomery, Alabama 36104

Re: ITC^DeltaCom Arbitration Against BellSouth
Reply Comments of ITC^DeltaCom Communications, Inc.; Docket #28841

Dear Mr. Thomas:

Enclosed herewith for filing are the original and 10 copies of the Reply Comments of ITC^DeltaCom in the above-referenced arbitration matter.

Very truly yours,

Robin G. Laurie

RGL/kp
Enclosures

5/27/2004
cpy to
comm
a. s.
Tesa
advisory Mark Maple
can stay Terry Butts
Tel (3) Jim Wilson

BEFORE THE ALABAMA
PUBLIC SERVICE COMMISSION

In Re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. With BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996	)))))	Docket No. 28841

REPLY COMMENTS OF
ITC^DELTACOM COMMUNICATIONS, INC.

ITC^DeltaCom Communications Inc., d/b/a ITC^DeltaCom and d/b/a Grapevine ("DeltaCom") pursuant to Rule T-26 (I)(2), in the above-captioned matter, hereby submits these reply comments.

I. Introduction and Background.

On April 27, 2004, the Arbitration Panel provided the Commission with its Recommendation concerning the unresolved issues pending in the arbitration between BellSouth Telecommunications, Inc. ("BellSouth") and DeltaCom. DeltaCom supports the Panel's Recommendation on all Issues except for Issue 25 regarding the provision of ADSL.[1] With regard to Issue 25, DeltaCom generally supports the comments filed by CompSouth.

II. Comments of CompSouth

BellSouth has asked the Commission to endorse its policy of tying its basic local regulated service to its DSL service. Thus, if an end user selects DeltaCom as its local provider and DeltaCom serves that end user via unbundled network elements, BellSouth will not allow that end user to continue to use BellSouth's DSL service. DeltaCom has

[1] BellSouth and DeltaCom have recently settled issues 59 and 60

offered BellSouth the high frequency portion of the loop that DeltaCom uses to provide local service to BellSouth at no charge.[2]

In its Recommendation, the Panel (with one dissent) noted BellSouth's claim that if it was required to continue to provide DSL service where the CLEC provides local service via UNE-P, such requirement would "discourage investment by penalizing the company that has taken all the risk." That concern is not material for at least four reasons. First, as noted in the record, over 97% of BellSouth's offices are DSL capable. Second, this investment relies on existing copper loops, which were paid for by the ratepayers of Alabama under a rate-of-return based regime. Third, BellSouth receives universal service support that again is paid for by Alabama consumers, who pay their telecommunications provider who in turn pays into the Federal Universal Service Fund.[3] Thus, the improvements made by BellSouth were made at least in part, perhaps in large part, with public money. Fourth, common sense dictates that a carrier with an embedded investment will not walk away from a consumer from which it will make a positive return, unless the carrier knows that it will be able to retain the consumer for all services. The only rational reason BellSouth would seek to deny that consumer DSL service is to enable BellSouth to retain a monopoly market share. BellSouth's own witness, Mr. Ruscilli, admitted that cable companies sell each service individually and do not "tie" their local, cable, and internet together.

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[2] Additionally, DeltaCom notes that Cinergy Communications Company recently filed a formal complaint with the FCC's Enforcement Bureau regarding BellSouth's refusal to permit the commingling of unbundled network elements and its tariffed services, including DSL. (See Exhibit 1).

[3] The Commission granted reconsideration of BellSouth's request to use $15 5 million for CSAs that allow advanced service capabilities In re: Implementation of the Universal Service Requirements of Section 254 of the Telecommunications Act of 1996, Order Granting Reconsideration, Alabama Public Service Commission, Docket No. 25980, 2-3 (April 19, 2004)

DeltaCom respectfully requests that the Commission review this issue, as it does have a negative impact on consumers in Alabama.

III. Conclusion

DeltaCom supports the Panel Recommendation with the exception of one issue, Issue 25. DeltaCom requests that the Commission adopt the recommendation of Judge Montiel.

Respectfully submitted this 27th day of May, 2004.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by U.S. Mail, properly addressed and postage prepaid, on this the 27th day of May, 2004:

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Annamarie Lemoine, Esq.	Bell South	404-614-4054	
Robert A. Bye	Cinergy Communications	(812) 759-1732	(913) 754-3333

Comments/Message:

EXHIBIT
1

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May 13, 2004

VIA FACSIMILE (202) 418-0435 AND HAND DELIVERY

Alex Starr, Esq.
Chief, Market Disputes Resolution Division
Enforcement Bureau - Room 5-A865
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***Request for Acceptance of Filing of Formal Complaint under the Enforcement Bureau's Accelerated Docket Procedures***

Dear Mr. Starr:

Pursuant to 47 U.S.C. § 208, and 47 C.F.R. § 1.730(b), Cinergy Communications Company ("CCC")[1] requests that the Enforcement Bureau ("Bureau") of the Federal Communications Commission ("Commission") approve the filing of a CCC Formal Complaint in the Bureau's Accelerated Docket against BellSouth Telecommunications, Inc. ("BellSouth"). CCC requests that the Bureau address BellSouth's repeated and continuing violations of Sections 201, 202, and 251(c)(3) of the Communications Act of 1934, as amended (the "Act"), and 47 C.F.R. § 51.309(e) & (f), by unlawfully refusing to allow the commingling of BellSouth tariffed ADSL transport services with CCC's purchase of UNE loops or combinations of UNEs. CCC also requests that the Bureau initiate Staff-supervised pre-filing settlement negotiations of the Section 208 formal

[1] Cinergy Communications Company is a wholly owned subsidiary of Q-Comm Corporation, a privately held corporation. Cinergy Corp. is a minority shareholder of Q-Comm and licenses the name Cinergy to Q-Comm for use by its subsidiary, CCC. Cinergy Corp. does not exercise managerial authority, oversight or control of CCC.

complaint that CCC intends to file against BellSouth to obtain redress for these violations of the Act and FCC rules.

A. The Commission has Jurisdiction of this Dispute Under its Section 208 Complaint Authority.

CCC's formal complaint would allege violations by BellSouth of Sections 201, 202, and 251(c)(3) of the Act, as amended. The Commission has repeatedly held that its Section 208 complaint authority includes jurisdiction to adjudicate claims of violations of the local competition provisions of Sections 251 and 252 of the Act.[2] It has also found that this interpretation furthers the purpose of the Act to promote competition. As the Commission has observed, "[a]llowing for the filing of a single complaint under section 208 enhances enforcement, and competition, by resolving the issues economically, helping to achieve uniform results, and relieving the parties of the burdens of multi-state litigation."[3]

B. The Dispute

The Commission has already directly addressed this very subject within the past year in its August, 2003 *Triennial Review Order* ("*TRO*"), holding that "*competitive LECs may connect, combine, or otherwise attach UNEs and combinations of UNEs to wholesale services (e.g., switched and special access services offered pursuant to tariff)....*"[4] The Commission underscored the importance of CLECs' ability to commingle UNEs and wholesale services by declaring to all ILECs that a refusal to allow commingling is a *per se* violation of Sections 201 and 202 of the Act. The Commission held that a restriction on commingling "*would constitute an 'unjust and unreasonable practice' under Section 201 of the Act, as well as an 'undue and unreasonable prejudice or advantage' under Section 202 of the Act.*" The Commission further warned that incumbent LEC restrictions on commingling would constitute a violation of Section 251(c)(3) of the Act.[5]

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[2] *Core Communications, Inc. v. Verizon Maryland Inc.*, 18 FCC Rcd 7962, 7971; Memorandum Opinion and Order (rel. April 23, 2003); *Core Communications, Inc. and Z-Tel Communications, Inc. v. SBC Communications, Inc., et al.*, 18 FCC Rcd 7568, 7573-7575, Memorandum Opinion and Order (rel. April 17, 2003).

[3] 18 FCC Rcd at 7575-7576.

[4] *In the Matter of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *et seq.*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (rel. August 21, 2003)("Triennial Review Order" or "TRO") at 365-366, ¶579 (emphasis added).

[5] *Id.* at 366-367, ¶581. The DC Circuit's March 2, 2004 decision in *United States Telecom Association v Federal Communications Commission*, 359 F.3d 554 (2004), vacated other portions of the Triennial Review Order, and these aspects of the *TRO* and Section 51.309 of the FCC's rules remain valid and enforceable FCC rules.

BellSouth, in direct violation of the Act, existing Commission rules, Commission orders, and even BellSouth's own FCC tariff, has refused to allow CCC to commingle its own UNE loops with BellSouth's tariffed wholesale DSL transport service to enable CCC to provide broadband services to its voice customers in BellSouth's region. As a consequence, CCC and the consumers to whom it seeks to provide voice and broadband services, throughout BellSouth's region,[6] have been harmed by the inability of CCC to offer competitive services. If BellSouth's anti-competitive acts are allowed to continue unchecked, BellSouth likely will cause CCC to lose many additional customers. CCC's ability to offer competitive broadband voice services to residential and business customers throughout BellSouth's region will also be significantly impaired. Accordingly, CCC respectfully requests it be approved to file a formal complaint under the Commission's accelerated procedures, and that staff-supervised negotiations be initiated immediately.

C. Factual Background

CCC is a regional competitive LEC offering voice, data and Internet access services to residential and business customers primarily in Kentucky, Tennessee and Indiana.[7] On September 10, 2003, following the Commission's *Triennial Review Order*, CCC submitted a written request to BellSouth seeking an amendment of its multi-state interconnection agreement[8] with BellSouth to permit commingling consistent with Commission rules pursuant to the change of law provision of that agreement.[9] In that letter, CCC specifically cited 47 CFR § 51.309(e) & (f) and paragraphs 579-584 of the TRO. CCC also proposed in its September 10 letter to BellSouth to use interconnection language providing for **"DSL TRANSPORT SERVICE ON UNE-P"** which had already been agreed upon between the parties pursuant to under section 2.10.1 of their arbitrated Kentucky interconnection agreement.[10] This agreement has been effective and successfully implemented by the parties in Kentucky since 2002.

BellSouth initially responded by September 17, 2003 letter that CCC would have to re-submit a request once the TRO became effective on October 2, 2003.[11] By October 2, 2003 email, CCC then renewed its request for an amendment of its interconnection agreement with BellSouth to conform to the Commission's then-effective commingling

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[6] CCC currently has interconnection agreements with BellSouth in Alabama, Florida, Georgia, Kentucky, Louisiana, North Carolina, South Carolina, and Tennessee

[7] CCC recently began serving customers in Florida, Illinois, Missouri and Ohio. CCC has obtained a state CLEC certificate and is preparing to enter Georgia, North Carolina, Alabama, Texas, Michigan, and Wisconsin.

[8] The interconnection agreement includes the states of Alabama, Florida, Georgia, Louisiana, North Carolina and South Carolina. *See*, n 8.

[9] *See*, September 10, 2003 letter of Robert A. Bye, Vice President and General Counsel, Cinergy Communications to Ms. Nicole Bracy, Manager, Interconnection Services, BellSouth ("Exhibit A")

[10] *See, Id.* at 2 & Ex. "A".

[11] *See*, September 17, 2003 letter from Nicole Bracy, Manager, Interconnection Services, BellSouth to Robert A. Bye, Cinergy Communications Company. ("Exhibit B")

rules.[12] CCC has had access to commingled BellSouth DSL transport service in Kentucky since its arbitrated interconnection agreement was approved by the Kentucky Commission on April 21, 2003.[13]

BellSouth's first response to CCC's request for an amendment of its BellSouth interconnection agreement was by a November 5, 2003 letter.[14] BellSouth in that letter attempted to distinguish CCC's request for commingling of BellSouth wholesale tariffed services with UNE combinations from the commingling requirements of the TRO. BellSouth argued that the line sharing provisions of the TRO control CCC's request, even though CCC clearly was not seeking to unbundle low frequency portions of the loop, since it was already ordering UNE-P services. Notwithstanding direct authority to the contrary in the TRO, BellSouth's inexplicable position is that "it is quite clear that the TRO does not require BellSouth to commingle our wholesale services with UNE-P."[15]

Shortly thereafter, BellSouth's interconnection negotiator sent CCC a letter enclosing several proposed amendments to the parties' interconnection agreement which were not even responsive to CCC's request.[16] Essentially, BellSouth was seeking post-TRO amendments to its interconnection agreement with CCC of interest to BellSouth, choosing to ignore CCC's requested amendment communicated on September 10, 2003 and October 2, 2003. On December 16, 2003, CCC responded by letter that BellSouth's correspondence and proposed amendments did not explain how the amendments were consistent with the TRO, and pointed out that BellSouth had failed to respond to CCC's request for amendment of the interconnection agreement to comply with the Commission's commingling rules.[17] CCC's letter of December 16, 2003 discussed and enclosed new commingling excerpts of BellSouth's Access Tariff, Tariff F.C.C. No. 1, Sec. 2.2.3 (Issued: October 2, 2003) which support CCC's request for commingled DSL transport access service.[18] CCC renewed its request for this commingled service consistent with BellSouth's provision of it to CCC in Kentucky. CCC further reminded BellSouth of the Commission's language in the TRO that failure to allow commingling would result in violations of Sections 201 and 202 of the Act, and failure to comply will

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[12] *See*, October 2, 2003 electronic mail from Robert A. Bye to Nicole Bracy and Annamarie Lemoine, BellSouth. ("Exhibit C").

[13] *See*, *BellSouth Telecommunications, Inc v. Cinergy Communications Co.*, 297 F Supp. 2d 946, 954 (E.D. Ky. 2003)(affirming July 12, 2002 Kentucky PSC determination that BellSouth violated Kentucky law because its "practice of tying its DSL service to its own voice service to increase its already considerable market power in the voice market has a chilling effect on competition and limits the prerogative of Kentucky customers to choose their own telecommunications carriers.")("Exhibit D")

[14] *See*, November 5, 2003 letter of Annamarie Lemoine, Senior Counsel, BellSouth to Robert A. Bye, Vice President and General Counsel, CCC. ("Exhibit E").

[15] *Id.* at 2.

[16] *See*, November 21, 2003 letter from Nicole Bracy, BellSouth to Robert A. Bye, Cinergy Communications (w/o attachments)("Exhibit F").

[17] *See*, December 16, 2003 letter from Robert A. Bye, Cinergy Communications, to Nicole Bracy, BellSouth. ("Exhibit G").

[18] *See, id.*, attachment (BellSouth Tariff F.C.C. No. 1, Sec. 2.2.3 Commingling, effective October 17, 2003)

result in specific penalties of $7,600 per offense and $330 for each day of the continuing offense.[19]

This dispute arises from a series of anticompetitive actions that BellSouth has taken in blatant disregard of the Commission's adopted rule under the *Triennial Review Order* permitting commingling of UNE combinations with tariffed services. The Commission expressly modified its rules under the *Triennial Review Order* to permit requesting carriers to commingle, or combine, UNEs and UNE combinations with tariffed services such as switched and special access, "*and to require incumbent LECs to perform the necessary functions to effectuate such commingling upon request.*" The development of local competition depends on the Commission exerting its jurisdiction to halt the erection of such barriers to entry and to prevent further damage to CLECs,[20] such as CCC, as they attempt to offer alternative local telecommunications services.

D. BellSouth Has Violated Sections 201(b) and 202(a) of the Act by Refusing to Make Available to CCC Commingled Services as Provided Under BellSouth Tariff FCC No. 1.

BellSouth's policy is even more blatant than simply a violation of the Act and Commission rules and orders. It is also a violation of the commingling provisions of BellSouth's very own federal access tariff, which BellSouth filed at its own discretion. Section 2.2.3 of BellSouth's Tariff F.C.C. No 1 expressly permits the commingling of combinations of UNEs with "Access services purchased under this Tariff..."[21] DSL transport is an access service which CCC has purchased and can purchase from the BellSouth Access Tariff, not as a UNE, or at a resale discount, but at tariffed rates. BellSouth has provided this tariffed service to CCC in Kentucky and to other voice competitors (including UNE-P providers) in its region without technical difficulty.

BellSouth has been unlawfully preventing CCC from exercising its rights to commingle UNE voice services with tariffed DSL transport by engaging in an unjust and unreasonable practice or classification, in violation of 47 U.S.C. § 201(b) of the Act, by failing to comply with the terms of its own federal tariff. The Georgia Commission, in an order requiring that BellSouth "discontinue its policy of requiring that customers receive voice service from BellSouth in order to receive BellSouth's DSL service," held that a UNE-P arrangement that BellSouth provides to a competitor meets the definition of an "in-service exchange line facility" under BellSouth Tariff F.C.C. No. 1.[22]

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[19] *Id.* at 2, citing TRO n.1792.

[21] *See* attached tariff excerpt to CCC December 16, 2003 letter to BellSouth (Exhibit G).

[22] *In re Petition of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc Concerning Interconnection and Resale Under the Telecommunications Act of 1996*, Docket No. 11901-U, at 3-4, 20 (Oct. 21, 2003). Georgia joins the states of Kentucky, Florida and Louisiana in concluding that BellSouth's policy of tying the purchase of BellSouth's DSL services to the

BellSouth's policy is a stark example of unjust or unreasonable discrimination by a dominant incumbent local exchange carrier in its practices, classifications, regulations, and offering of facilities or services in violation of 47 U.S.C. § 202(a). In addition, BellSouth's policy also violates Section 202(a) of the Act by making or giving undue or unreasonable preference or advantage to BellSouth, while subjecting CCC and other BellSouth voice competitors, and their customers, to undue or unreasonable prejudice or disadvantage.

The Commission already concluded last year that such anti-competitive practices restricting commingling constitute violations of Sections 201 and 202 of the Act.[23] The Commission should find that BellSouth's policy of non-compliance with its federal tariff and Commission orders is an unlawful violation of Sections 201 and 200 of the Act, and should assess sanctions as it has previously committed to doing for such violations.

E. BellSouth's Refusal to Provide Commingling of its Tariffed DSL Transport Service with CCC's Voice Service Is Unlawful.

The Act enables CCC to serve its customers utilizing a combination of its own facilities, wholesale facilities and finally, unbundled network elements of an incumbent LEC. The U.S. Supreme Court recently confirmed that the Telecommunications Act of 1996 was designed to allow competitors to utilize all three modes of entry, where available, in order to create competing product offerings:

> The 1996 Act . . . obligates incumbent carriers to allow competitors to enter their local markets, § 251(c). Section 251(c) addresses the practical difficulties of fostering local competition by recognizing three strategies that a potential competitor may pursue. First, a competitor entering the market (a "requesting" carrier, § 251(c)(2)), may decide to engage in pure facilities-based competition, that is, to build its own network to replace or supplement the network of the incumbent. At the other end of the spectrum, the statute permits an entrant to skip construction an instead simply buy and resell "telecommunications service," which the incumbent has a duty to sell at wholesale. §§ 251(b)(1) and (c)(4). Between these two extremes, an entering competitor may choose to lease certain of an incumbent's "network elements," which the incumbent has a duty to provide "on an unbundled basis" at terms that are "just, reasonable and nondiscriminatory." § 251(c)(3).

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purchase of BellSouth's voice service is an anticompetitive tying arrangement designed to protect its voice service from competition by inhibiting the end-user's ability to choose its provider of local service. *Id.* at 17-18.

[23] TRO at 366-367, ¶581; *see also,* discussion *supra* at 2 & n.5.

Verizon Communications v. FCC, 535 U.S. 467, 491-492 (2002). Without commingling, CCC would be required to provide DSL as a stand-alone service which would vastly and unreasonably increase CCC's costs. The dramatic increase in cost creates a barrier to entry to a marketplace which is demanding bundled voice and data service from a single provider, such as what BellSouth markets in the states where CCC competes. CCC has customers ready, willing and able to accept its services as soon as it is allowed to commingle those wholesale services it can purchase out of the tariff with those that are purchased from BellSouth pursuant to the terms of its interconnection agreement.

As discussed above, BellSouth's willful refusal to comply with its express obligation under the TRO to permit "*competitive LECs...*[to] *connect, combine, or otherwise attach UNEs and combinations of UNEs to wholesale services (e.g., switched and special access services offered pursuant to tariff)...*" is unlawful. *See also*, 47 C.F.R. § 51.309(e) & (f). The effect is to deny consumers and competitors the very access to UNEs and combinations of UNEs for voice competition that Congress and the Commission have sought to ensure since the 96 Act. As the Kentucky Commission concluded, if consumers are unable to get broadband Internet access from a competitor, because the dominant incumbent LEC is tying its broadband DSL service to its own voice service, any rational consumer will avoid using a competitor for voice service if at the same time it disqualifies the consumer from accessing broadband services.

The requirement that DSL services be provided by incumbent LECs "upon reasonable request; on just, reasonable, and nondiscriminatory terms; and in accordance with all applicable tariffing requirements..." is not new. While the Commission has not required that bulk DSL services be offered to commercial providers such as telecommunications carriers and ISPs at a resale discount, it has held that these are "*telecommunications services, and as such, incumbent LECs must continue to comply with their basic common carrier obligations with respect to such services.*"[24]

BellSouth has also been unlawfully preventing CCC from exercising its rights to commingle UNE voice services with tariffed DSL transport by refusing to negotiate in good faith a change of law provision in its existing multi-state interconnection agreement with CCC.

F. BellSouth Has Refused to Negotiate in Good Faith as Required by the Act and Commission Rule.

The statutory duty to negotiate in good faith devolves upon incumbent LECs to negotiate "the particular terms and conditions of agreements to fulfill the duties of incumbent LECs described in Section 251 (b) and (c) of the Act." 47 U.S.C. § 251(c)(1). This duty extends to negotiating in good faith terms for "nondiscriminatory access to

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[24] *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Second Report and Order, at 12, ¶21 (rel. Nov. 9, 1999) ("*Second Advanced Services Order*")(emphasis added).

network elements on an unbundled basis...on rates, terms, and conditions that are just, reasonable and nondiscriminatory...." 47 U.S.C. § 251(c)(3). The duty to negotiate in good faith is also required by Commission rule.[25] Finally, even the parties' multistate interconnection agreement requires the parties to "renegotiate in good faith such mutually acceptable new terms as may be required" in the event of a change of law that materially affects any material terms of the Agreement.[26]

BellSouth's responses to CCC's demands to negotiate a change of law provision in its multistate interconnection agreement with BellSouth demonstrate that there is an impasse in the already protracted discussions between the parties, and that further negotiations are futile without Commission intervention. BellSouth has obviously used delay and obfuscation tactics to attempt to dictate its positions to CCC and avoid confronting BellSouth's requirements under Commission Orders, Commission Rules, and its FCC tariff. As such, it has violated the duty to negotiate in good faith, and in particular, by engaging in the practice of "intentionally obstructing or delaying negotiations or resolutions of disputes."[27] In fact, one federal district court has recently affirmed the Kentucky Commission's conclusion that BellSouth's unlawful tying arrangement of its DSL transport service to use of BellSouth voice services, in CCC's own case, serves "to increase its [BellSouth's] already considerable market power in the voice market has a chilling effect on competition and limits the prerogative of Kentucky customers to choose their own telecommunications carriers."[28]

Therefore, CCC believes that the matter can be resolved only by the Commission and/or Commission Staff confirming the applicability of the relevant orders and Commission rules to the specific facts of this dispute. Given the Commission's authority to enforce its own orders and rules, BellSouth FCC Tariff No.1, and concurrent jurisdiction with the states in interconnection matters, this is the most appropriate forum in which this dispute should be brought. Furthermore, as the Commission has previously found, a Commission remedy, when appropriate, can avoid needless multi-state litigation which impairs the promotion of local competition that Congress intended under the Act.

G. This Dispute Should Be Accepted in the Accelerated Docket.

In light of the irreparable injury to CCC if it loses additional customers due to BellSouth's refusal to provision adequate facilities and compensate CCC for such facilities according to federal law, CCC urges the Commission to accept this matter for inclusion on the Accelerated Docket based on the considerations set forth in Section 1.730(e) of the Commission's Rules, 47 C.F.R. § 1.730(e):

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[25] *See*, 47 C.F.R. § 51.301.
[26] *See*, Sec. 16.3 at 16, General Terms and Conditions, Interconnection Agreement between BellSouth Telecommunications Inc. and Cinergy Communications Company (for the states of Alabama, Florida, Georgia, Louisiana, North Carolina and South Carolina (eff. February 26, 2003)).
[27] 47 C.F.R. § 51.301(c)(6).
[28] *Cinergy Communications Co.*, 297 F. Supp. 2d at 954.

1. *Whether the parties have exhausted the reasonable opportunities for settlement during Staff-supervised settlement discussions*: Though CCC believes additional discussions on its own with BellSouth are futile, it is requesting Staff-supervised settlement discussions by this letter.

2 *Whether the expedited resolution of a particular dispute appears likely to advance telecommunications competition*: The delays that BellSouth has imposed upon CCC represent barriers that foreclose free market choices and directly undermine Congress' and the Commission's goals of promoting local competition. As the Kentucky PSC itself concluded in its Kentucky 271 Advisory Opinion: "*BellSouth is aggressively offering customers bundled voice and advanced services while, according to AT&T, BellSouth consistently precludes CLECs who use the unbundled network element platform (UNE-P) from offering customers this same option. This has the effect of chilling local competition for advanced services*."[29] The Kentucky PSC has already concluded that BellSouth's practice of tying BellSouth's DSL service solely to customers who subscribe to BellSouth's own voice service has "*a chilling effect on competition and limits the prerogative of Kentucky customers to choose their own telecommunications carriers*."[30] By helping to provide an expedited resolution of this dispute, the Commission will maximize consumers' competitive options and help promote the rapid introduction of telecommunications competition that the 96 Act sought to foster. If the Supreme Court's reassurance in its recent *Trinko* decision that the regulatory framework under the 96 Act "'significantly diminishes the likelihood of major antitrust harm'" is to have meaning and substance, then the Commission should certainly act here when presented with evidence of such violations and unlawful tying arrangements by an incumbent LEC with market power in the local voice market.[31]

3. *Whether the issues appear suited for decision under the constraints of the Accelerated Docket*: The parties hereto are not disputing questions of fact. This dispute primarily turns on the proper interpretation of section 251 (c)(3) of the 1996 Act, Commission Rule 51.309(e) & (f), the TRO and other Commission rules and orders, and whether BellSouth is meeting its competitive obligations under these authorities, or whether Commission enforcement action is required.

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[29] *Kentucky 271 Advisory Opinion* at 13-14, quoted in *BellSouth Telecommunications, Inc. v. Cinergy Communications Co.*, 2003 U.S. Dist. LEXIS 23976 at 22.

[30] *Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252*, Kentucky Public Service Commission Case 2001-00432, July 12, 2002 Order at 7, quoted in *Cinergy Communications Co.*, 297 F. Supp. 2d at 954.

[31] *See, Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 124 S.Ct. 872, 881 (2004) quoting *Concord v. Boston Edison Co.*, 915 F.2d. 17, 25 (1st Cir. 1990); *see also, Cinergy Communications Co.*, 297 F. Supp. 2d at 954.

4. *Whether there are claims of violation of the Act, Commission rule or order that fall within the Commission's jurisdiction*: This dispute presents clear-cut violations of Sections 201, 202 and 251(c)(3) of the Act, and 47 C.F.R. §§ 51.309(e) and 51.309(f) of the Commission's Rules. It also presents violations of sections 579 to 584 of the *Triennial Review Order*, and paragraph 21 of the 1999 *Second Advanced Services Order*.

5. *Whether inclusion in the Accelerated Docket would be unfair to one party due to overwhelming disparity in the parties' resources*: Although there is indeed an overwhelming disparity in the parties' resources, neither party would be disadvantaged by this forum. In fact, inclusion in the Accelerated Docket would help correct some of the overwhelming imbalance of BellSouth's superior resources to litigate.

6. *Such other factors as the Staff may deem appropriate and conducive to a prompt and fair adjudication of complaint proceedings*: BellSouth's conduct to date has caused CCC to suffer a significant and continuing economic loss, including loss of customers, has harmed CCC's business reputation, and precluded CCC's timely market entry. BellSouth's actions, if not addressed immediately, will result in a de facto foreclosure of competitive choices for voice and advanced telecommunications service customers throughout BellSouth's region. Such a result will only encourage similar actions by other ILECs in the future. Clarification of this matter by the Commission by prompt action will discourage similar anticompetitive actions by BellSouth and other ILECs in other states, thereby eliminating the incentive for other ILECs to establish similar barriers to competition. Immediate resolution of this dispute, initially through Staff-supervised settlement discussions, would therefore be in the public interest.

F. Conclusion

As explained above, BellSouth has engaged in conduct unlawful under the Communications Act and the Commission's regulations and orders. Because of the irreparable injury that these actions have caused CCC to date and threaten to cause CCC on a continuing basis, CCC respectfully requests that the Commission immediately schedule and supervise pre-filing settlement negotiations between the parties and, if the parties are unable to resolve their dispute, accept the dispute for handling on the Accelerated Docket.

Please direct any questions concerning this matter to the undersigned.

Yours truly,

Douglas G. Bonner

Enclosures

cc: Annamarie Lemoine, Esq.(BellSouth) (via facsimile 404/614-4054 and U.S. Mail)
Mr. Jerry Hendrix (BellSouth) (via U.S. Mail)
Robert A. Bye, Esq.

DC 256518 1 07844 00001 05/13/04 11:36am

Cinergy Communications Company
8829 Bond Street
Overland Park, KS 66214
phone 913.492.1230
fax 913.492.1684

September 10, 2003

CINERGY. COMMUNICATIONS

Via Federal Express

Ms. Nicole Bracy
Manager, Interconnection Services
BELLSOUTH INTERCONNECTION SERVICES
675 W. Peachtree Street, NE
Room 34S91
Atlanta, GA 30375

Re: Request for amendment to Interconnection agreement due to change in law

Dear Nicole:

As I indicated to you in our conversation of September 5, 2003, this letter is to request an amendment to the Interconnection Agreement between Cinergy Communications Company and BellSouth for the states of Alabama, Florida, Georgia, Lousisiana, North Carolina, and South Carolina effective as of February 26, 2003. This request shall serve as the fifteen (15) day written notice, pursuant to paragraph 16.3 of the aforementioned agreement, requesting a renegotiation due to a change in law.

The change in law results from the release of the Triennial Review Order ("TRO") and the related federal rules which become effective October 2, 2003. The relevant new rules are 47 CFR § 51.309(e) and (f) which provide:

> (e) Except as provided in § 51.318, an incumbent LEC shall permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with wholesale services obtained from an incumbent LEC.
>
> (f) Upon request, an incumbent LEC shall perform the functions necessary to commingle an unbundled network element or a combination of network elements with one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC.

"Commingling" is a newly defined term in the regulations: Commingling means the connecting, attaching, or otherwise linking of an unbundled network element, or a

EXHIBIT A

combination of unbundled network elements, to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC, or the combining of an unbundled network element, or a combination of unbundled network elements, with one or more such facilities or services.

Based upon the foregoing, Cinergy Communications is requesting the ability to commingle UNE-P and wholesale DSL transport. As a means of avoiding operational delays, Cinergy Communications will agree to extend the DSL over UNE-P language agreed to in the parties' Kentucky agreement to the regionwide agreement. For your convenience, I have attached a copy of the previously agreed-to language as Exhibit "A." Since this interim solution appears to be working in Kentucky between the parties, it seems reasonable to extend this experience into the remainder of the BellSouth territory.

Cinergy Communications is also requesting an amendment to both the Kentucky and regionwide interconnection agreements with BellSouth to include a commingling of UNE-P with BellSouth's wholesale voicemail product, as well as any other tariffed offering provided by BellSouth.

For further information on the commingling issue, see paragraphs 579 through 584 of the TRO. It makes clear that BellSouth must revise its tariffs to allow for commingling.

Cinergy Communications reserves the right to a future true-up to allow for this change in law. Nothing herein shall be construed as a waiver of any other rights to which Cinergy Communications may be entitled as a result of the TRO or other change in law. This request is limited to the issue of commingling. In the event BellSouth will not agree to an amendment as requested herein with fifteen (15) days, Cinergy Communications reserves all rights it may have to pursue civil damages and other penalties for denial of commingling rights.

I look forward to working with you to reach an amicable resolution of this matter. If you have any questions, or wish to discuss this in detail, please do not hesitate to give me a call.

Very truly yours,

Robert A. Byrd

Vice President and
General Counsel

EXHIBIT A

cc:

BellSouth Telecommunications, Inc.
BellSouth Local Contract Manager
600 North 19th Street, 8th Floor
Birmingham, Alabama 35203

and

BellSouth Telecommunications, Inc.
ICS Attorney
Suite 4300
675 W. Peachtree St.
Atlanta, GA 30375

Ex. "A"

available, Cinergy Communications Company may utilize the Unbundled Loop Modification process or the Special Construction process, as applicable, to obtain the Loop type ordered.

2.10.1 DSL TRANSPORT SERVICE ON UNE-P

2.10.1.1 For purposes of this Section 2.10.1.1, the term "DSL," "DSL transport," or "DSL Transport Services" shall mean that DSL transport service in the BellSouth F.C.C. Number 1 tariff in effect as of, July 12, 2002, the date of the Kentucky Public Service Commission's Order in Case No. 2001-00432. In order to comply with the Order, BellSouth shall not refuse to provide any DSL transport service to a network service provider pursuant to a request from such network service provider who serves, or desires to serve, an end-user that receives UNE-P based voice services from Cinergy Communications. However, BellSouth shall have no obligation to provide DSL transport on any loop that is not qualified for DSL, provided that BellSouth shall not make a change to any loop so as to make it not qualify for DSL on the basis of that such loop is being converted to UNE-P, rather than on the basis of architectural, mechanical, or physical limitations.2.10.1.2 The Order in is predicated upon the ability of customers of Cinergy Communications to receive wholesale ADSL transport at the same price it was available pursuant to Bellsouth Tariff F.C.C. Number 1 on the date of that Order. In the event this offering is no longer available for any reason, BellSouth agrees to provide to Cinergy Communications a wholesale ADSL transport product for the duration of this interconnection agreement on the same pricing, terms and conditions as those in the BellSouth Tariff F.C.C. Number 1 as of the date of the Order subject to section 2.10.1.1 above. The terms and prices of BellSouth Tariff F.C.C. Number 1 as it existed on the date of the Order are incorporated herein by reference as necessary to comply with this section.

2.10.1.3 Notwithstanding the foregoing, BellSouth shall have no obligation to provide its retail, DSL-based high speed Internet access service, currently known as BellSouth® FastAccess® DSL service, to an end-user that receives UNE-P based voice services from Cinergy. To the extent BellSouth chooses to deny FastAccess to an end user, BellSouth shall not seek any termination penalties against, or in any other fashion seek to penalize, any such end-user that Cinergy identifies to BellSouth pursuant to a process to be agreed upon and reduced to writing. BellSouth shall also notify the aforementioned end-user at least ten (10) days prior to discontinuing its FastAccess service.

2.10.1.4 Cinergy shall make available to BellSouth at no charge the high frequency spectrum on UNE-P for purposes of enabling BellSouth to provision DSL transport on the same loop as the UNE-P based voice service.

2.10.1.5 When BellSouth provides tariffed DSL transport over Cinergy UNE-P, BellSouth shall have the right, at no charge, to access the entire loop for purposes of troubleshooting DSL-related troubles.

2.10.1.6 BellSouth shall not be obligated to provide tariffed DSL transport in accordance with this Section 2.10.1 until completion of the modification of systems and processes that will enable BellSouth to qualify Cinergy UNE-P lines for DSL as well as maintain and repair such DSL on Cinergy UNE-P lines. Until such time as BellSouth completes the aforementioned modification of systems and processes, BellSouth agrees to provide to Cinergy Communications wholesale DSL transport service over resale lines on the following conditions: (1) the underlying resale line and its features shall be provided by BellSouth to Cinergy Communications at the rate that Cinergy Communications normally pays for a UNE-P loop/port combination in the pertinent UNE Zone, specifically excluding subscriber line charges, and other charges normally associated with resale; (2) BellSouth shall bill and collect the access or other third party charges applicable to such lines, and shall remit to Cinergy monthly, as a surrogate for such access charges, an amount determined in accordance with the formula set forth in Section 2.10.1.6.1 below; (3) because BellSouth cannot provide hunting between resale and UNE-P lines, any other lines of the end-user served by Cinergy Communications shall also be converted to resale at no charge upon submission of an LSR for such conversion and provided pursuant to (1) and (2) above unless and until BellSouth agrees to provide hunting between resale and UNE-P platforms; and (4) once the aforementioned modification of systems and process is completed, BellSouth agrees to convert all end-user lines affected by this section to UNE-P at no charge upon Cinergy Communications' submission of an executable LSR for such conversion.

2.10.1.6.1 The parties agree that the amount payable to Cinergy as a surrogate for access charges in accordance with Section 2.10.1.6 above shall be determined by multiplying the average number of Cinergy resale lines with DSL service, and those lines included in a hunt group with such DSL resale lines in accordance with subsection 3 of Section 2.10.1.6 above, for the most recent three (3) billing cycles preceding the date of this agreement by $12.00 per line. Such rate is based upon Cinergy's estimate of its access charges, including subscriber line charges, presubscribed interexchange carrier charges, and usage charges, on a per line basis. Within sixty (60) days following the date of this Agreement and upon BellSouth's request, the parties agree to true up this amount to conform with the average per line access charges Cinergy collects on its UNE-P lines. Cinergy shall provide supporting documentation to justify the true up amount.

2.10.1.6.2 The Parties agree that subject to Section 2.10.1.6.1, the rates charged pursuant to Section 2.10.1.6 above are not subject to true-up regardless of appeal or change in law. Any change to these rates or to the provisions of Section 2.10.1 et seq. shall

be prospective only in the event of a change in law as described in the General Terms and Conditions of this Agreement.

2.10.1.7 Cinergy Communications shall provide BellSouth with all current pertinent customer information necessary for BellSouth to comply with this section. Cinergy Communications authorizes BellSouth to access customer information on BellSouth systems as necessary for BellSouth to comply with this section. BellSouth shall provide Cinergy Communications with all current pertinent loop information necessary for Cinergy Communications to provide DSL over UNE-P, including but not limited to, loop qualification information for UNE-P lines.

2.10.1.8 If a request is made for DSL on an existing Cinergy Communications UNE-P line, Cinergy shall cooperate with BellSouth in an effort to determine loop make-up and qualification status. The parties shall mutually agree on a procedure and shall reduce same in writing.

3. High Frequency Spectrum Network Element

3.1 General

3.1.1 BellSouth shall provide Cinergy Communications Company access to the high frequency spectrum of the local loop as an unbundled network element only where BellSouth is the voice service provider to the end user at the rates set forth in this Attachment.

3.1.2 The High Frequency Spectrum is defined as the frequency range above the voiceband on a copper loop facility carrying analog circuit-switched voiceband transmissions. Access to the High Frequency Spectrum is intended to allow Cinergy Communications Company the ability to provide Digital Subscriber Line ("xDSL") data services to the end user for which BellSouth provides voice services. The High Frequency Spectrum shall be available for any version of xDSL complying with Spectrum Management Class 5 of ANSI T1.417, *American National Standard for Telecommunications, Spectrum Management for Loop Transmission Systems*. BellSouth will continue to have access to the low frequency portion of the loop spectrum (from 300 Hertz to at least 3000 Hertz, and potentially up to 3400 Hertz, depending on equipment and facilities) for the purposes of providing voice service. Cinergy Communications Company shall only use xDSL technology that is within the PSD mask for Spectrum Management Class 5 as found in the above-mentioned document.

3.1.3 Access to the High Frequency Spectrum requires an unloaded, 2-wire copper Loop. An unloaded Loop is a copper Loop with no load coils, low-pass filters, range extenders, DAMLs, or similar devices and minimal bridged taps consistent with ANSI T1.413 and T1.601.

BELLSOUTH

BellSouth Interconnection Services
675 W. Peachtree Street, NE
34S91
Atlanta, Georgia 30375

Nicole Bracy
(404) 927-7596
FAX (404) 529-7839

Sent Via Email and U.S. Mail

September 17, 2003

Mr. Robert A. Bye
Cinergy Communications Company
8829 Bond Street
Overland Park, KS 66214

Re: Request for Amendment to Interconnection Agreement due to change in law

Dear Bob:

This is in response to your letter dated September 10, 2003, regarding Cinergy Communications Company's (Cinergy) request to amend its Interconnection Agreement for the states of Alabama, Florida, Georgia, Louisiana, North Carolina and South Carolina ("Region-wide Agreement") to include provisions for commingling Unbundled Network Element-Platform (UNE-P) with BellSouth's wholesale DSL transport. Cinergy is also requesting to amend its Kentucky and Region-wide Agreements to include provisions for commingling UNE-P with BellSouth's wholesale voice mail product, as well as any other tariffed offering provided by BellSouth.

The General Terms and Conditions in Section 16.3 of Cinergy's Region-wide Agreement and Section 17.3 of Cinergy's Kentucky Agreement states:

> "In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of Cinergy or BellSouth to perform any material terms of this Agreement, Cinergy or BellSouth may, on fifteen (15) days' written notice...."

Although the Federal Communications Commission's Triennial Review Order (TRO) has been released, it is not effective before October 2, 2003. Thus, the language allowing either party to request renegotiation of affected terms upon 15 days notice has not yet been triggered. Once the TRO has become effective, Cinergy will need to send an e-mail or written notice to BellSouth to invoke Sections 16.3 and 17.3 of the respective Agreements.

Once the Parties enter into negotiations for Cinergy's requests to commingle, we will address the substantive issues raised in your letter.

If you have any questions, please give me a call.

Sincerely,

EXHIBIT B

Nicole Bracy
Manager, Interconnection Services

EXHIBIT B

Bob Bye

From: Bob Bye [bye@cinergycom.com]
Sent: Thursday, October 02, 2003 5:48 PM
To: 'Bracy, Nicole'; 'Lemoine, Annamarie'
Cc: 'John Cinelli'; 'Al Cinelli'; 'Pat Heck'; 'Henry Walker'; 'Bob Bye'
Subject: Request for amendment due to change in law

Nicole,

On Septemeber 10th, Cinergy Communications made its initial request for an amendment due to chagne in law. The contents of that letter are incorporated herein by reference. In addition, this is to also request commingling of DSL and UNE-P in KY. While we already have this right in Kentucky, I want to make sure that our ability to commingle is not taken away to the extent BellSouth wins its appeal of our arbitration decision. In your response of September 17, 2003, you directed me to submit an email on this date to again request the amendment. This email shall invoke Sections 16.3 and 17.3 of the respective agreements per your instructions and express waiver of the formal notice requirements contained in those agreements.

The new regulations at issue which require a change in law are 47 CFR 51.309(e) and (f) which provide:

(e) Except as provided in 51.318, an incumbent LEC shall permit a requesting telecommunciations carrier to commingle an unbundled network element or combination of unbundled network elements with wholesale services obtained from an incumbent LEC.

(f) Upon request, an incumbent LEC shall perform the functions necessary to commingle an unbundled network element or a combination of unbundled network elements whith one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC.

Currently, BellSouth's tariffs for wholesale DSL transport provide a limitation that requires provisioning only over in-service BellSouth controlled access lines. BellSouth interprets this to mean only lines where BellSouth carries the voice or lines which are provided by a CLEC via resale. Pursuant to the above-referenced regulation, Cinergy Communications is requesting that BellSouth modify its tariff and incorporate language into the interconnection agreement that would overturn this restriction and allow Cinergy Communications to provide UNE-P or UNE-L and wholesale DSL transport commingled over a single copper loop.

Paragraph 581 of the TRO provides, "we require incumbent LECs to effectuate commingling by modifying their interstate access service tariffs to expressly permit connections with UNEs and UNE combinations." DSL transport is an access service and contained in BellSouth's access tariff. In fact, BellSouth argued in briefs and before the U.S. Dist. Ct. in Kentucky that DSL was an access service, so no argument can be made that this rule does not apply to DSL transport.

To the extent BellSouth will not comply, Cinergy Communications is prepared to pursue all available remedies. The FCC has already determined in the TRO that this practice is unjust and unreasonable under 201 of the Act as well as an undue and unreasonable prejudice or advantage under 202 of the Act.

Because the above issue relates to a specific, valid regulation, there is no need to wait until the states have completed their impairment analysis to conclude negotiations. Nor is there anything in the interconnection agreement that would require the parties to include all impairment issues in our negotiations. To the contrary, we are entitled to this relief as of today and demand access as soon as possible.

This is to request that SBC negotiate this issue in good faith. Good faith requires, at a minimum, assigning a representative to negotiate who is up to speed on the issues and who has authority to bind the company. I would be more than happy to travel to Atlanta to meet with the appropriate BellSouth representative in person to resolve this issue.

EXHIBIT C

I look forward to working with you and resolving this matter in an amicable and timely fashion.

Robert A. Bye
Vice President and General Counsel
Cinergy Communications Company
8829 Bond St.
Overland Park, KS 66214
(913) 492-1230 ext. 5132
(812) 759-1732 (Fax)

EXHIBIT C

LEXSEE 2003 US DIST LEXIS 23976

BELLSOUTH TELECOMMUNICATIONS, INC., PLAINTIFF, v. CINERGY COMMUNICATIONS COMPANY, et al., DEFENDANTS.

CIVIL ACTION NO. 03-23-JMH

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

297 F. Supp. 2d 946; 2003 U.S. Dist. LEXIS 23976

December 29, 2003, Decided

DISPOSITION: [**1] AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff incumbent local exchange carrier (ILEC) sought review of a Kentucky Public Service Commission (PSC) decision which held that the ILEC could not refuse to provide Digital Subscriber Line (DSL) service pursuant to a request from an Internet service provider who served, or who wished to serve, a customer who chose to receive voice service from a Competitive Local Exchange Carrier (CLEC), of which defendant was one.

OVERVIEW: The ILEC asserted that the PSC's decision purported to regulate interstate telecommunications services in a manner that was directly contrary to binding Federal Communications Commission (FCC) rulings and to the ILEC's federal tariff. The ILEC argued that PSC's order had to fail because of federal preemption, stating that, as a matter of federal law, the FCC - not state commissions - had exclusive jurisdiction over interstate communications. The court held that nothing in the state regulations stood as an obstacle to the accomplishment and execution of the full objectives of Congress. The Telecommunications Act of 1996 (1996 Act), P.L. 104-104, incorporated the concept of cooperative federalism, whereby federal and state agencies harmonized. Quite clearly, the 1996 Act made room for state regulations, orders and requirements of state commissions as long as they did not substantially prevent implementation of federal statutory requirements. The PSC's order embodied just such a requirement. It established a relatively modest interconnection-related condition for the ILEC so as to ameliorate a chilling effect on competition for local telecommunications regulated by the PSC.

OUTCOME: The PSC's decision was affirmed.

CORE TERMS: telecommunications, customer, interconnection, internet, regulation, state commission, arbitration, negotiation, carrier, state law, transmission, interstate, provider, retail, broadband, network, Telecommunications Act, arbitrary and capricious, chilling effect, federal law, line-splitting, capabilities, high-speed, competitors, offering, substantial evidence, competitive, unsupported, telephone line, preempted

LexisNexis (TM) HEADNOTES - Core Concepts:

Communications Law > Federal Acts > Telecommunications Act

[HN1] The Telecommunications Act of 1996, P.L. 104-104, places certain obligations on incumbent local exchange carriers - the companies that have traditionally offered local telephone service in particular areas. These obligations are intended to assist new local telecommunications providers. These new local competitors are often referred to as competitive local exchange carriers or "CLECs."

Communications Law > Federal Acts > Telecommunications Act

[HN2] Incumbent local exchange carriers (ILECs) must, among other things, lease to their competitors for the provision of a telecommunications service, nondiscriminatory access to network elements on an

EXHIBIT D

unbundled basis. *47 U.S.C.S. § 251*(c)(3). In addition to requiring access to Unbundled Network Elements, the Telecommunications Act of 1996, P.L. 104-104, requires ILECs to offer their complete, finished retail telecommunications services provided to end users, to new entrants for resale. *47 U.S.C.S. § 251*(c)(4).

Communications Law > Federal Acts > Telecommunications Act
[HN3] The Telecommunications Act of 1996 (1996 Act), P.L. 104-104, contains a specific scheme for implementing the new obligations imposed by the federal statute. This scheme contains three parts. First, Congress intends the mandates of *47 U.S.C.S. § 251* to be implemented in the first instance through the negotiation of private, consensual agreements between incumbent local exchange carriers (ILECs) and competitive local exchange carriers (CLECs). Thus, § 251 imposes on both ILECs and CLECs the duty to negotiate in good faith in accordance with *47 U.S.C.S. § 252* the particular terms and conditions of agreements to fulfill the specific duties imposed on incumbents by *47 U.S.C.S. § 251*.

Communications Law > Federal Acts > Telecommunications Act
[HN4] The Telecommunications Act of 1996 (1996 Act), P.L. 104-104, contains a specific scheme for implementing the new obligations imposed by the federal statute. Second, as a backstop to reliance on privately negotiated agreements, Congress has enlisted the aid of state public utility commissions. If the parties are unable to agree on all issues within 135 days after the competitor's initial request for negotiation, either party may petition the state commission to arbitrate any "open issues." *47 U.S.C.S. § 252*(b)(1). Regardless of whether the parties reach agreement through voluntary negotiation, mediation, or arbitration, the private parties must submit their agreement to the relevant state commission for approval *47 U.S.C.S. § 252*(e)(1). Third, and lastly, state commission decisions under this statute are subject to review in federal district courts for conformity with the terms of the 1996 Act. *47 U.S.C.S. § 252*(e)(6).

Administrative Law > Judicial Review > Standards of Review > Standards Generally
[HN5] The United States Court of Appeals for the Sixth Circuit has adopted and utilized a two-tiered review procedure when reviewing a ruling of a state administrative body.

Communications Law > Federal Acts > Telecommunications ActAdministrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious ReviewAdministrative Law > Judicial Review > Standards of Review > De Novo Review
[HN6] The federal judiciary first reviews de novo whether a state public service commission's orders comply with the requirements of the Telecommunications Act of 1996 (1996 Act), P.L. 104-104. The court also reviews a state public service commission's interpretation of the 1996 Act de novo, according little deference to the state public service commission's interpretation. If no illegality is uncovered during such a review, the question of whether the state commission's decision is correct must then be analyzed, but under the more deferential arbitrary-and-capricious standard of review usually accorded state administrative bodies' assessments of state law principles.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review
[HN7] The arbitrary and capricious standard is the most deferential standard of judicial review of agency action, upholding those outcomes supported by a reasoned explanation, based upon the evidence in the record as a whole. A court will uphold the decision if it is the result of a deliberate principled reasoning process, and if it is supported by substantial evidence. Thus, absent clear error in interpretation of federal law or unsupported, arbitrary and capricious findings by a state commission, the decisions of state commissions generally stand.

Communications Law > Federal Acts > Telecommunications Act
[HN8] See *47 U.S.C.S. § 252*(b)(4)(a).

Communications Law > Federal Acts > Telecommunications Act
[HN9] The United States Supreme Court has recognized that Telecommunications Act of 1996, P.L. 104-104, cannot divide the world of domestic telephone service "neatly into two hemispheres," one consisting of interstate service, over which the Federal Communications Commission (FCC) has plenary authority, and the other consisting of intrastate service, over which the states retain exclusive jurisdiction. Rather, observed the Supreme Court, the realities of technology and economics belie such a clean parceling of responsibility. The FCC noted that state commission authority over interconnection agreements pursuant to *47 U.S.C.S. § 252* extends to both interstate and intrastate matters.

Constitutional Law > Supremacy Clause
[HN10] State laws can be expressly or impliedly preempted by federal law. Federal law may preempt state law when federal statutory provisions or objectives would be frustrated by the application of state law.

Moreover, where Congress intends for federal law to govern an entire field, federal law preempts all state law in that field. The United States Court of Appeals for the Sixth Circuit has held that when a state law is not expressly preempted, courts must begin with the presumption that the law is valid. It will not be presumed that a federal statute was intended to supersede the exercise of power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly presumed.

Constitutional Law > Supremacy ClauseCommunications Law > Federal Acts > Telecommunications Act

[HN11] When Congress enacted the Telecommunications Act of 1996 (1996 Act), P.L. 104-104, it did not expressly preempt state regulation of interconnection. In fact, it expressly preserved existing state laws that furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition. Specifically, *47 U.S.C.S. § 251*(d)(3) of the 1996 Act states that the Federal Communications Commission shall not preclude enforcement of state regulations that establish interconnection and are consistent with the 1996 Act. *47 U.S.C.S. § 251*(d)(3).

Constitutional Law > Supremacy ClauseCommunications Law > Federal Acts > Telecommunications Act

[HN12] The Telecommunications Act of 1996 (1996 Act), P.L. 104-104, permits a great deal of state commission involvement in the new regime it sets up for the operation of local telecommunications markets, as long as state commission regulations are consistent with the 1996 Act. Congress has made clear that the states are not ousted from playing a role in the development of competitive telecommunications markets however, Congress did not intend to permit state regulations that conflicted with the 1996 Act. Thus, a state may not impose any requirement that is contrary to terms of *47 U.S.C.S. § 251*-261 or that stands as an obstacle to the accomplishment and execution of the full objectives of Congress. According to the Federal Communications Commission, as long as state regulations do not prevent a carrier from taking advantage of *47 U.S.C.S. §§ 251*, 252 of the 1996 Act, state regulations are not preempted.

Constitutional Law > Supremacy ClauseCommunications Law > Federal Acts > Telecommunications Act

[HN13] The Telecommunications Act of 1996 (1996 Act), P.L. 104-104, incorporates the concept of "cooperative federalism," whereby federal and state agencies "harmonize" their efforts and federal courts oversee this "partnership." Quite clearly, the 1996 Act makes room for state regulations, orders and requirements of state commissions as long as they do not "substantially prevent" implementation of federal statutory requirements.

Governments > State & Territorial Governments > Licenses

[HN14] See *Ky. Rev. Stat. Ann. § 278.280(1)*.

COUNSEL: Plaintiff, BellSouth Telecommunications, Inc. represented by Dorothy J. Chambers BellSouth Telecommunications, Inc., Louisville, KY, Mark R. Overstreet, Stites & Harbison, Frankfort, KY, Sean A. Lev, Kellogg, Huber, Hansa, Todd & Evans, P.L.L.C., Washington, DC.

Defendant, Cinergy Communications Company, a Kentucky corporation represented by C. Hatfield, Middleton & Reutlinger, Louisville, KY, Robert Byc, Cinergy Communications Company, Overland Park, KS.

Kentucky Public Service Commission, represented by Amy E. Dougherty, Public Service Commission of Kentucky, Frankfort, KY, Deborah Tully Eversole, Public Service Commission of Kentucky, Frankfort, KY.

Martin J. Huelsman, in his official capacity as Chairman of the Kentucky Public Service Commission represented by Amy E. Dougherty, Public Service Commission of Kentucky, Frankfort, KY, Deborah Tully Eversole Public Service Commission of Kentucky, Frankfort, KY.

Gary W. Gillis, in his official capacity as Vice Chairman of the Kentucky Public Service Commission represented by Amy F. Dougherty, Public Service Commission of Kentucky, Frankfort, KY, Deborah Tully Eversole, Public Service Commission of Kentucky, [**2] Frankfort, KY.

Robert F. Spurlin, in his official capacity as a Commissioner of the Kentucky Public Service Commission represented by Amy F. Dougherty, Public Service Commission of Kentucky, Frankfort, KY, Deborah Tully Eversole, Deborah Tully Eversole, Public Service Commission of Kentucky, Frankfort, KY.

JUDGES: Joseph M. Hood, United States District Judge.

OPINIONBY: Joseph M. Hood

OPINION:

[*947] MEMORANDUM OPINION AND ORDER

In this action, BellSouth Telecommunications, Inc. ("BellSouth") seeks review of a Kentucky Public Service Commission ("PSC" or "Commission") decision. The decision at issue was the result of an arbitration conducted by the Commission pursuant to Sections 251 and 252 of the Telecommunications Act of 1996, *47 U.S.C. § § 251-252* (the "1996 Act"). The crux of the decision to which BellSouth objects states that:

> BellSouth may not refuse to provide Digital Subscriber Line ("DSL") service pursuant to a request from an Internet service provider who serves, or who wishes to serve, a customer who has chosen to receive voice service from a Competitive Local Exchange Carrier ("CLEC") that provides service over the Unbundled Network Elements [**3] Platform ("UNE-P")

Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252, Case 2001-00432, October 15, 2002 Order. BellSouth asserts that the Commission's decision purports to regulate interstate telecommunications services in a manner that is directly contrary to binding Federal Communications [*948] Commission ("FCC") rulings and to BellSouth's federal tariff. BellSouth also claims that the Commission should never have decided the issue presented in this case because it was not set forth in Cinergy's arbitration petition as required by the 1996 Act. Additionally, BellSouth argues that the PSC's decision was arbitrary and unsupported by the record

I. BACKGROUND

A. Procedural Background

Cinergy is a privately-owned, Kentucky corporation which has been operating in Kentucky as a telecommunications provider since 1977. To facilitate its service to Kentucky residents, Cinergy entered into an initial interconnection agreement with BellSouth which expired on November 29, 2001. On May 30, 2001, Cinergy commenced negotiations with [**4] BellSouth for a new interconnection agreement pursuant to *Section 251 of the 1996 Act*. Despite a number of negotiation sessions over the next several months, the parties were unable to reach agreement on a number of issues. As a result, on December 10, 2001, Cinergy filed a Petition for Arbitration pursuant to *Section 252 of the 1996 Act*, requesting the PSC resolve sixteen disputed issues.

BellSouth filed its formal Response to the Petition on January 3, 2002, admitting the Commission had jurisdiction over the issues raised by Cinergy. The Commission set a procedural schedule for resolution of the case. Pursuant to the schedule, the parties filed agreed-upon portions of the interconnection agreement, as well as "Best and Final Offers" on the disputed issues. On January 31, 2002, the Commission Staff sponsored an informal conference at which the remaining issues were discussed and debated, including the precise issue BellSouth claims was not properly part of the proceeding. Limited discovery occurred, followed by the filing of direct, and some rebuttal testimony by the parties.

As a result of continued settlement negotiations, only four issues were ultimately submitted to, and decided [**5] by, the Commission. The Commission heard the case in a formal hearing on May 22, 2002, which lasted a full day. The parties filed post-hearing briefs, proposed findings of fact and conclusions of law, and an additional brief on a specific issue requested by the Commission. The Commission issued its decision on July 12, 2002. n1

> n1 PSC Chairman Huelsmann dissented on the issue of BellSouth's refusal to provide Broadband services to a customer of a CLEC who is providing voice services via UNE-P citing regulatory uncertainty, inconsistency with FCC rulings, and lack' of harm to Cinergy as the main reasons for his dissent.

Both parties sought clarification or rehearing of the Commission's Order. On October 15, 2002, the Commission clarified its Order, and issued a further Order on February 28, 2003, necessitated by the parties' inability to agree on the language for the interconnection agreement which would effectuate the Commission's decisions. On March 20, 2003, the parties submitted the interconnection agreement [**6] to the Commission, containing language specified by the Commission, on the disputed provisions. The Commission approved the interconnection agreement on April 21, 2003.

BellSouth commenced the present appeal by filing its complaint on May 9, 2003. Timely answers and briefs were filed. BellSouth challenges only the Commission's decision that BellSouth may not refuse to provide DSL capabilities to customers for whom a CLEC, such as Cinergy, is [*949] the voice provider through means of the UNE-P.

B. The Telecommunications Act of 1996

[HN1] The 1996 Act places certain obligations on incumbent local exchange carriers ("ILECs") such as BellSouth - the companies that have traditionally offered local telephone service in particular areas. These obligations are intended to assist new local